CN - Orgo farms + Greenhouses, Inc. 5/28/85

v.

Twp of Colts Neck

Memorandum on behalf of Pls Orgo farms + Brunelli in support of granting of a ~~developer~~ developer's remedy to build the specific project proposed + presented to the Court

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FRIZELL & POZYCKI
296 Amboy Avenue
P.O. Box 247
Metuchen, New Jersey 08840
(201) 494-3500
Attorneys for Plaintiffs

ORGO FARMS & GREENHOUSES, INC., a New Jersey Corporation, and RICHARD J. BRUNELLI Plaintiffs, vs. TOWNSHIP OF COLTS NECK, a Municipal Corporation, et al, Defendant.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION (MT. LAUREL) OCEAN/MONMOUTH COUNTIES Docket Nos. L-3299-78PW L-13769-80PW
SEA GULL LTD. BUILDERS, INC., Plaintiff, vs. THE TOWNSHIP OF COLTS NECK,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION (MT. LAUREL) OCEAN/MONMOUTH COUNTIES Docket No. L-3540-84

MEMORANDUM ON BEHALF OF PLAINTIFFS ORGO FARMS AND BRUNELLI

ON THE BRIEF

DAVID J. FRIZELL
KENNETH E. MEISER

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INTRODUCTION

After six years of litigation by Orgo/Brunelli, resolution of this case essentially turns on the answer to one question: Does Orgo/Brunelli lose its claim to first priority for a builder's remedy because it is located in a limited growth area? If Orgo/Brunelli were located in a growth area, its first priority right to a builder's remedy would be absolutely assured. It brought a Mount Laurel lawsuit against Colts Neck in 1978 and for 5 1/2 years fought alone to force Colts Neck to bring its zoning ordinance into compliance with Mount Laurel. Orgo Farms proved the Colts' Neck zoning ordinance unconstitutional before Judge Lane and before the Appellate Division, only to face a remand from the Supreme Court after Mount Laurel II. At the direction of Judge Lane, Orgo/Brunelli spent 14 days in hearings before the Colts Neck Zoning Board, unsuccessfully seeking approvals for its inclusionary development.

There can be no question that Orgo/Brunelli has succeeded in litigation; Colts Neck did not even try to prove that its 1978 ordinance which Orgo/Brunelli successfully invalidated before Judge Lane offers any opportunity for the construction of lower income housing. There can be no question that Orgo/Brunelli is prepared to provide low and moderate income housing; that offer was made as part of its initial complaint, remained on the table during the "least cost" days of Oakwood v. Madison and continues today. Nor is there any

doubt of the suitability of the site, as was reflected in the Caton testimony. In short, but for the limited growth designation Orgo/Brunelli would automatically receive first priority to a developer's remedy because it filed its Mount Laurel complaint years before Sea Gull.

The primary purpose of this brief is to demonstrate that there should be no "but for", that Orgo/Brunelli is entitled to first priority for a builder's remedy regardless of its limited growth designation. Plaintiffs will first examine the reasons this court gave in Orgo Farms v. Colts Neck 192 N.J. Super 599, 605 (Law Div., 1983) why a builder's remedy could be granted in a limited growth area:

1. The spirit of the opinion calls for this result.
2. The impact that a contrary result would have on the Mount Laurel goals is entirely inconsistent with these goals.
3. The Court's discussion of the builder's remedy makes no reference to the SDGP classification.
4. Caputo v. Chester (Mount Laurel II 92 N.J. at 309 et seq.) suggests the possibility that a remedy is available in a limited growth area.

The brief will focus upon this court's conclusion that "Mount Laurel II demonstrates in at least three distinct ways an intent not to make the SDGP a component of builder's remedy". Orgo Farms supra at 607.

Plaintiffs agree that Mount Laurel II demonstrates in at least three distinct ways an intent not to deny a builder's remedy on the basis of a limited growth designation prior to January 1, 1985. Even more importantly, Mount Laurel II directly states that SDGP location should not be a basis for determining who gets a builder's remedy after January 1, 1985

in the absence of a SDGP revision. Mount Laurel II states directly and bluntly:

> In order for it (the SDGP) to remain a viable remedial standard, we believe that the SDGP should be revised no later than January 1, 1985. Mount Laurel II at 242 (emphasis added).

Colts Neck and Sea Gull argue that the builder's remedy should be awarded to Sea Gull instead of Orgo/Brunelli based on the standard of SDGP classification, the very standard for remedy which the Supreme Court found to be no longer viable! To deprive Orgo/Brunelli a builder's remedy prior to January 1, 1985 based on its SDGP designation would seem to be arguably inconsistent with the conclusions of Orgo Farms. To go further and assert that Orgo/Brunelli can be deprived of priority in a builder's remedy after January 1, 1985 is to fundamentally disregard the clear language of the New Jersey Supreme Court in Mount Laurel II.

Moreover, plaintiffs will demonstrate that even if this court is prepared as a general rule to deny builder's remedies to plaintiff in limited growth areas despite the failure to update the SDGP, this case cries out for an exception. Plaintiffs will contrast the extended history of Orgo/Brunelli in fighting for Mount Laurel principle since 1978, with the belated entry into the case of Sea Gull to demonstrate that equity demands a remedy for Orgo/Brunelli. Plaintiffs will show how a denial of relief to Orgo/Brunelli in this case is tantamount to blind application of Time of Decision rule. Finally plaintiffs will show that the Department of Community Affairs specifically reviewed the

Orgo Farms application and concluded that it would not be inconsistent with the SDGP.

For all of these reasons, the conclusion is inescapable that Orgo/Brunelli is entitled to priority in obtaining a developer's remedy regardless of its SDGP designation.

STATEMENT OF FACTS

Plaintiffs are the Orgo/Brunelli property owners of the legal and equitable interests in property located on Route 537 in the Township of Colts Neck and known as Block 48, Lots 11, 20 and 48-01 on the official tax map of the Township of Colts Neck. The Orgo family bought the subject property in 1935 and 1938, many years prior to the adoption of zoning regulations in the Township. Ernest T. Orgo, President of Orgo Farms & Greenhouses, testified that the family had farmed the property for 35 years. The property had been used for general farming and for a nursery for the wholesale florist business. (Transcript June 26, 1980, p. 143-163). The property which consists of 214 acres is located near the intersection of Routes 537, N.J. Highway 34 and N.J. Route 18. The State Development Guide Plan (hereinafter referred to as "SDGP") designates Route 18 among the six major highways in Monmouth County. SDGP at p. 104.

Before contracting to purchase the Orgo tract, plaintiff Richard J. Brunelli engaged planning consultants to determine the suitability of the site for a planned development incorporating housing types mandated by the Supreme Court in Mount Laurel I. Plaintiff Brunelli engaged in an extensive analysis of the site from environmental and planning perspectives and reviewed available governmental studies, including but not limited to the Township Master Plan and supporting documentation, the Monmouth County General Development Plan, and the TriState Regional Planning Commission Guide.

The Township Master Plan designated approximately one half of the property for commercial uses. The Master Plan of the Township also proposes a roadway, "Joshua Huddy Drive", which runs through the site. The Township Master Plan further envisaged development in the southerly portion of the township as a result of the construction of the Route 18 Freeway. The Township Master Plan projected the possibility of an extension of a sewer line connector in the southerly portion of the Township in the vicinity of the Orgo tract. The Orgo tract is located at the intersection of the three major roadways which traverse the Township: State Highway Route 34, Monmouth County Route 537 and State Highway Route 18 Freeway. The proximity of this site to these major corridors minimizes the utilization of roads through existing or proposed low density residential/agricultural districts of the Township by the future residents.

In 1978 the Monmouth County General Development Plan designated the Orgo tract for two types of uses, office and research facilities and low density residential uses. The Highway 34 frontage adjacent to plaintiffs' project was designated under the County plan for commercial and retail uses. The County Planning Board's Natural Features Study specifically includes the subject property among those areas in "Planning Area V" which are highly suitable for development. The Growth Management Guide of the Monmouth County Planning Board, although not adopted until April 1982, shows a village center at and near plaintiffs' property, even

though the Guide shows Colts Neck Township as a limited growth area.

The TriState Regional Planning Commission, the interstate agency established by legislative action of the states of Connecticut, New Jersey and New York, which had been recognized by the Federal Government as the official planning agency for the tristate region, also found that Colts Neck Township can and should provide residential densities for new developments up to seven units per net acre. The Orgo tract was within that area designated by the Commission to have recommended densities for new developments at 2 to 6.9 dwelling units per net acre. Among the major objectives of the TriState Regional Plan is the preservation of critical areas by concentrating development on suitable sites.*

ORGO BRUNELLI LITIGATION 1978 -1984

In August 1978 plaintiffs met informally with Township officials to request a rezoning of the Orgo tract in order to allow the development of a variety and choice of housing and to concomitantly relieve the property of unreasonable and confiscatory zoning regulations. After a negative response from Township officials, plaintiffs filed an action on September 22, 1978 alleging that the zoning ordinance of Colts Neck Township was exclusionary.

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* The Commission's conclusions are based on an analysis of prime farmland and public water supply watershed catchment areas. The TriState study also reveals that almost all of the undeveloped portions of the tristate metropolitan region are part of catchment areas.

On July 3, 1979 the Honorable Merritt Lane, Jr. rendered an opinion from the bench declaring the Colts Neck Township Zoning Ordinance void for failure to provide an appropriate variety and choice of housing types. The Colts Neck zoning ordinance required that all residential housing in the undeveloped portion of the Township be built upon lot sizes in excess of two acres. All houses were required to have a minimum floor area of at least 2,000 square feet. The Township was directed to adopt within 90 days a reasonable zoning ordinance incorporating a variety and choice of housing types. The judgment was affirmed by the Appellate Division and cross petitions for certification were filed with the New Jersey Supreme Court. In rendering his opinion Judge Lane stated that plaintiffs were not entitled to specific relief for their property because of their failure to submit a development application for formal review by Township administrative agencies.

In order to exhaust administrative remedies in accordance with Judge Lane's opinion plaintiffs made an application with supporting documentation to the Zoning Board of Adjustment of Colts Neck Township for a variance pursuant to N.J.S.A.40:55D-70(d) to permit use of the tract in question as a planned unit development, and for approval of the preliminary site plan for that proposal.

On September 20, 1979 the Zoning Board of Adjustment rejected the application and refused to grant plaintiffs a hearing on the development application. On October 11, 1979

plaintiffs filed a complaint in lieu of prerogative writs to compel the Board of Adjustment to consider and grant the development application. That complaint was docketed as L-6822-79.

On April 24, 1980 the Honorable Patrick J. McGann, Jr. ruled that plaintiffs had submitted a complete application to the Zoning Board of Adjustment on the merits of the application. Judge McGann further ruled that the Zoning Board must render a decision by August 22, 1980. That order was filed on May 5, 1980. On July 18, 1980 at the request of the Zoning Board and with applicants' consent the decision date was extended.

The Zoning Board of Adjustment conducted public hearings on the variance application on May 29, June 12, 17, 19, 26, July 15, 17, 24, 29, 31, August 7, 14 and 21. On August 25, 1980 the Board considered summation by counsel and evidentiary objections and also deliberated and voted on the application.

Both the Township's petition for certification and the plaintiffs' variance case remained undecided while the Supreme Court decided the Mount Laurel II cases. On January 20, 1983, the Court rendered its decision and on May 4, 1983, remanded this case to the trial court for consideration in light of that decision.

On October 3, 1983, Eugene D. Serpentelli, J.S.C. rendered an opinion holding that the fact that the plaintiff's properties were located in a "limited growth" area of the SDGP,

does not bar plaintiffs from obtaining a builder's remedy. The plaintiffs could still, under appropriate circumstances, be entitled to a builder's remedy.

Subsequent to this decision, the matter was scheduled for trial. A few weeks before trial, in early 1984, the Township made a motion to consolidate this action with that of an action that had been filed in January of 1984 by another developer, Sea Gull Ltd. Builders, Inc. Approximately two (2) weeks before the trial date the motion was granted by the Court.

In March of 1984, the Court heard several days of testimony on the issue of whether or not the Township of Colts Neck should be included entirely within the "limited growth area" of the State Development Guide Plan. The Court ruled that it should not. Before the trial could be concluded, the Court adjourned the trial in order to resume the case against Warren Township. The matter was not rescheduled for trial for one (1) year.

On July 30, 1984 a case management conference was held and on August 2, 1984 this Court sent all counsel a letter summarizing the proceedings at that conference. In the letter, the Court asked the Township attorney to advise it within twenty days if the Township sought to defend the validity of the Township's 1978 zoning ordinance which Judge Lane had invalidated. The Township never responded and never chose to even attempt any defense of its 1978 ordinance.

In September 1984 the Township amended its zoning ordinance. This court on May 3, 1985 ruled that the court

would determine the right to a builder's remedy based upon the ordinance in effect at the time that the Orgo/Brunelli complaint was filed in 1978.

CATON REPORT

In the Spring of 1984, the Court appointed Philip Caton, a Professional Planner, to investigate and report to the Court regarding the suitability of the sites for the award of a builder's remedy. Caton's report uses five (5) objective criteria to analyze the suitability of the two (2) sites for a builder's remedy. These five (5) criteria are:

(i) Environmental suitability;
(ii) Proximity to public services and proximity to private goods and services;
(iii) Accessibility to the regional transportation network;
(iv) Accessibility to sewer and water utilities;
(v) Compatibility with local, regional and statewide planning documents.

The report did not "compare" the two (2) sites, but rather reported independently on each of them. In the report, the Orgo/Brunelli site is found to be clearly superior to the Sea Gull site in terms of proximity to public and private goods and services. The sites are substantially equal in terms of proximity to the regional transportation network. The Orgo site is found to be clearly environmentally suitable whereas the topography of the Sea Gull site presents challenges to development because of the steep slopes. The Sea Gull site would be superior in terms of water and sewer availability if it were part of Freehold Township or had access to that Township's utility system. The report indicates that the ability on the part of the Orgo/Brunelli site to construct a

suitable and feasible sewer system was unchallenged. The ability of the Orgo/Bruneilli site to obtain a potable water supply from ground water resources was questioned, but this was resolved when the Monmouth Consolidated Water Company produced documentation to the effect that it could and would provide water service to the site.

There was only one (1) criterion in which the Sea Gull site faired better than the Orgo/Brunelli site, and that was the fact that the Sea Gull site is located within the SDGP growth area, whereas the Orgo/Brunelli site is located in the limited growth area. On all other objective criteria, the Orgo/Brunelli site faired better or was equal to the Sea Gull site. Under the objective criteria used by Caton, both sites must be found to be suitable for a builder's remedy according to the planning criteria set forth by the Supreme Court.

CATON TESTIMONY

At trial, Caton confirmed the findings in his report. He noted at trial that after his report had been filed indicating the Orgo/Brunelli site to be suitable for a builder's remedy, and pointing out the fact that the existing Township Master Plan recognized the suitability of the site by designating it for commercial/industrial uses, the Township had changed the master plan and zoning ordinance of the Township to designate almost all of the entire Township for very large lot agricultural uses. It had, however, designated the Sea Gull site and a small surrounding area for higher density forms of housing. On direct examination by the Township attorney, Caton indicated that he personally

would favor the Sea Gull site provided two conditions were met:

(i) That the Orgo/Brunelli site required a growth inducing water main to be constructed through existing agricultural areas; and
(ii) That the Sea Gull site would be given sewer and water utilities by the Township of Freehold.

Subsequently, evidence at the trial established that the conditions of Caton's preference were unachievable, i.e., the Monmouth Consolidated Water Company documented the fact that it would provide water to the Orgo/Brunelli site by means of a water main that would be sized to prohibit further connections and would accept a severe limitation on the size of the franchise area. The Planning Consultant and the Township Administrator of Freehold Township testifed at trial that under no conditions would the Township of Freehold provide sewer or water utilities to the Sea Gull site. The Township of Freehold had taken the position that the development of the Sea Gull site, as indicated by the Colts Neck Township Master Plan, was inconsistent with the welfare of the residents of Freehold Township and, in any event, Freehold Township was under a severe water restriction imposed by the Department of Environmental Protection. At the trial, Sea Gull, Ltd. was unable to demonstrate by any credible evidence that it is able to provide sewer or water to its location. It depends entirely on the Township of Freehold for both of these utilities. Although some testimony was produced concerning other possibilities, the experts testified that none of the other possibilities were

"probable". Sea Gull, Ltd.'s ability to provide utilities to its site, except for the Freehold Township alternatives, is pure speculation, and cannot be relied upon by the Court as the foundation of a decision. With respect to the Freehold Township alternatives, in light of the position taken by Freehold Township, the Court must conclude that it is highly improbable that Sea Gull, Ltd. will obtain utilities from Freehold Township. The evidence, including that presented by water allocation Chief, Ernest Hardin, of the Department of Environmental Protection, indicates that Freehold Township has no water to provide to Colts Neck Township, and scarcely has enough water for its own residents. With respect to sewer facilities, Freehold Township is part of the Manasquan River Regional Sewer Authority. That Authority cannot act on an application from Sea Gull, Ltd. except upon the official endorsement of Freehold Township, which will not be provided. There is no statutory or case law under which Sea Gull, Ltd. may proceed to require Freehold Township to endorse its application for a sewer connection, nor is Freehold Township a party to this litigation. Nothing in Mount Laurel II addresses this issue and the Court cannot grant a builder's remedy based upon speculation about the outcome of possible future litigation against Freehold which might expand Mount Laurel II to cover this situation, especially when presented with a clear and present alternative of a qualified and suitable builder ready, able and willing to proceed to fulfill Colts Neck Township's Mount Laurel responsibility without the need for cooperation from Freehold. Caton also

testified that his "conditional" preference for the growth area Sea Gull site was heavily influenced by the adoption of the new Township Ordinance. After 25 years of continuous "urban sprawl" and large lot exclusionary zoning policies, the Township had enacted an exclusionary farm preservation policy. While the development of the Orgo site as proposed was consistent with historic development patterns in Colts Neck, it would be inconsistent with the new policy. While this change did influence Caton to express a conditional preference for Sea Gull, it did not change the fundamental finding of "suitability" regarding the Orgo/Brunelli site. To permit a death bed conversion by Colts Neck Township to influence the outcome of this case is tantamount to enforcing the Time of Decision rule.

PROPOSED FINDINGS OF FACT

1. The Plaintiffs, Orgo/Brunelli, are successful Mount Laurel litigants. This issue can hardly be challenged. The Township maintained its severely exclusionary ordinance to the bitter end. This Court's Time of Decision Rule makes it clear that it is the six year litigation of Orgo/Brunelli which caused the invalidation of the 1978 ordinance.

2. Orgo/Brunelli has offered to provide a substantial amount of lower income housing in Colts Neck Township. This finding must also be unchallenged, in that even before Mount Laurel II, these Plaintiffs proposed to build subsidized housing in Colts Neck Township as part of an overall planned development, and have continued throughout this litigation their efforts to provide lower income and affordable housing in an exclusionary community.

3. The Orgo/Brunelli site is suitable under the standards established by the Supreme Court. A Builder, otherwise entitled to a developer's remedy who has prevailed in litigation and offers to build a percentage of lower income housing can be deprived of it only if his property is shown to be clearly contrary to sound land use planning. This is clearly not the case here. Virtually all of the planners who testified in this case confirmed that the five (5) criteria set forth in the Caton Report should be used in assessing the suitablilty of a site for a Mount Laurel remedy. The Orgo/Brunelli site qualifies under all of those criteria. The only criterion on which the Orgo/Brunelli site can be

questioned is the fact that it is not located in the SDGP growth area. Otherwise, by any objective criteria used, it is a virtually ideal site for the use proposed.

4. Even if the Sea Gull, Ltd. site were in fact a better site (which it is not) or were preferred by the municipality, this would not defeat the Orgo/Brunelli right to a builder's remedy. The Mount Laurel II decision itself makes this point in no uncertain terms by establishing only three criteria for a developer's remedy. There was virtually no evidence presented at the trial to the effect that the Orgo/Brunelli site was not suitable under Mount Laurel II standards. The Township and Sea Gull, Ltd. attempted to demonstrate that the Sea Gull site was "more suitable" as if this was the relevant standard to be adopted by the Court. The Supreme Court has specifically prohibited the Trial Court from using this standard in assessing the suitability of the Orgo/Brunelli site. Moreover, the Supreme Court has also held that a builder's remedy cannot be defeated by a municipal preference for some other site, even if in fact it is a better site. Mount Laurel II supra at 280. The Orgo/Brunelli site must be judged on its own merits without regard to the issue of which site is preferred by the Township.

5. The Sea Gull site is not feasible because the owner has no ability to provide utilities to this site. There is no credible evidence in this record that the Sea Gull site has a "probable" chance of obtaining sewer or water facilities to this site in view of Freehold Township's position that it will not permit utilities to be provided

through Freehold. It is crucial to evaluate the testimony of Mr. Thomas, the Freehold Planner, and Mr. Jahn the Freehold Administrator. Thomas stated that Freehold has never given any consideration to supplying water outside its boundaries. This would make the Township a purveyor of water, subject to state regulation, something it vehemently opposes. Thomas concluded that there is no possibility that water or sewer services will be extended outside Freehold Township. Likewise, Jahn emphasized the same point, declaring that Freehold had conveyed to Sea Gull its position unequivocably in writing.

The Court cannot assume that sewer and water facilities will some day be provided in light of the lack of any credible evidence of any kind that there is a feasible alternative available to Sea Gull, Ltd. which will provide utilities to that site. The Court is faced with the likelihood of awarding a remedy which can either never be fulfilled or which can be fulfilled only if Sea Gull institutes and succeeds in prolonged litigation against Freehold.

6. The Orgo/Brunelli site is clearly superior to the Sea Gull site in terms of municipal planning, and to grant the builder's remedy requested by Orgo/Brunelli would have more beneficial long range effects. A careful reading of the Caton report discloses that the Orgo/Brunelli site is preferable to the Sea Gull site in every objective test, although both sites are "acceptable". The Township's only

real objection to the Orgo/Brunelli site is that it is centrally located and therefore too "visible" for its exclusionary tastes. Experience in Bedminster reveals that these fears are dispelled after the actual units are built and that the long range benefits of the central location will soon become evident. The issue presented is whether it is "better" to put Mount Laurel communities in convenient and accessible locations or to put them in remote and isolated corners of the Township. Freehold Township has planned the Sea Gull area for large lot single family housing. Freehold Township, which has historically attempted to resolve its Mount Laurel obligations in an affirmative way, would have its own community planning severely disrupted by Colts Neck's proposed rezoning, and has vigorously opposed it. Colts Neck seeks to "unload" its Mount Laurel obligation on Freehold Township.

The County Master Plan favors the Orgo/Brunelli site, or is neutral. The Orgo/Brunelli site is in the Colts Neck Village area, the only "village center" in Colts Neck, whereas all other parts of the Township are "Limited Growth" in the County Master Plan, including the Sea Gull site. The County Planning Board has taken the position that the Sea Gull site is unsuitable for Mount Laurel zoning.

7. The Orgo/Brunelli site has established feasibility, whereas the Sea Gull site does not. The Sea Gull site, and the entire compliance area of Colts Neck, has no sewer or water facilities. Colts Neck Township has no ability or intention of providing these utilities. Instead, Colts Neck

expects that Freehold Township will provide utilities. This is not realistic because:

A. Freehold has its own difficulties providing water service to its existing and projected populations. The Department of Environmental Protection has ordered Freehold to discontinue depleting groundwater supplies.

B. The Colts Neck's Plan is inconsistent with Freehold's Master Plan and community welfare.

C. Colts Neck's plan is inconsistent with the regional sewer authority charter (Manasquan Regional System).

D. Colts Neck's plan is inconsistent with the 208 Water Quality Management Plan of Monmouth County - the DEP cannot grant approval without a substantial amendment to the Plan. Freehold's consent is required for the Plan amendment and the charter amendment and the sewer construction.

E. Sea Gull's plan contradicts new DEP regulations designed to protect groundwater supplies. Sea Gull intends to draw 100,000 gallons per day from the aquifers - the maximum allowed by law under DEP regulations, to service about three hundred homes while litigating against Freehold. (Sea Gull intends to sue Freehold if awarded a remedy in Colts Neck.) This plan is no longer feasible because new DEP regulations allow only 10,000 g.p.d. to be drawn without an "allocation". Sea Gull had planned to

avoid the regulations by drawing up to the limit without an "allocation permit". It is extremely unlikely that an allocation permit would be issued because of the severe public health dangers which are cited by DEP due to overdepletion of groundwater in Monmouth County.

8. Any concerns raised by the Township about the merits of the Orgo/Brunelli proposal can be addressed in the review process after a builder's remedy order is issued. The Township claims that an award to the Plaintiff, Orgo/Brunelli, will suddenly transform the town. It is concerned that the visual impact of this development will have a negative effect on Colts Neck Township and that adjacent farming uses will be adversely affected. All of these concerns can be addressed by a sensitive review process which includes consideration of the phasing of the development, the size and scale of the proposed development, and site plan conditions of appraisal which eliminate or mitigate any adverse impacts.*

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* Plaintiff recently revised the plans for development of the tract in order to increase the percentage of low and moderate income housing to be included in the project. As part of the builder's remedy which plaintiffs request, they propose two alternatives for phasing of the project. Plaintiffs first request that the first 25% of the project be constructed as conventional housing without the inclusion of any low and moderate income housing. Thereafter, plaintiffs request the approval of one of two alternatives for lower income housing. Both alternatives would permit a phasing in of the lower income units after the first 25% conventional housing is built. Thereafter, at least 30% of the remaining housing constructed would be for lower income households.

PROPOSED CONCLUSIONS OF LAW

I. ORGO/BRUNELLI IS ENTITLED TO A BUILDER'S REMEDY BECAUSE IT HAS SATISFIED ALL THREE MOUNT LAUREL CRITERIA.

Orgo/Brunelli is a successful Mount Laurel litigant. See proposed finding of fact 1, Page 16, supra, it has offered to provide a substantial amount of lower income housing, Page 16 supra, its site is suitable for lower income housing, Page 16 supra. Having met the three criteria of Mount Laurel I, it is therefore entitled to a builder's remedy.

II. ORGO/BRUNELLI'S LOCATION IN A LIMITED GROWTH AREA SHOULD NOT CURTAIL ITS RIGHT TO A PRIORITY FOR BUILDER'S REMEDY.

A. THIS COURT'S DECISION IN ORGO FARMS DEMONSTRATES THE POLICY REASONS WHY A BUILDER'S REMEDY CAN BE GRANTED IN A LIMITED GROWTH AREA.

This court in its decision in Orgo Farms v. Colts Neck Township 192 N.J. Super. 599 (Law Div. 1983) held that even prior to January 1, 1985 a developer in a limited growth area was not precluded from getting a builder's remedy. The Court gave four reasons for its decision. First the spirit of the Mount Laurel II decision calls for this result. The Court first noted that the entire decision "evidence of desire to liberally apply builder's remedies". Colts Neck supra at 606. Second, this Court noted that a contrary rule would severely impair Mount Laurel's goals because more than fifty

percent of our state is classified as being outside a growth area. The Court noted that the purpose of the SDGP "is to control growth--not to eliminate it" Orgo Farms Id. at 606. The court observed that a builder might very well be able to demonstrate that, even though he is located in a limited growth area, his development would comport with sound planning and have no negative environmental impact. Under such circumstances there would be no rational reason to deprive him of a builder's remedy. Third, Mount Laurel II "demonstrates in at least three distinct ways an intent not to make the SDGP a component of builder's remedy." Orgo Farms Id. at 607. If the Court had intended to restrict the builder's remedy to growth areas, it would surely have said so. It however, did not do so. Fourth, the discussion of Caputo v. Chester suggests that a developer in a limited growth area could receive a developer's remedy. Orgo Farms supra at 607.

Thus, this court concluded that a developer in a limited growth area could legitimately be entitled to a builder's remedy. The court did suggest that perhaps the burden of proof in this situation should be shifted to the builder. Even if this court were inclined to shift the burden of proof in this case, there is no doubt that the proofs of Orgo/Brunelli demonstrate that any burden of proof that might be imposed to show the suitability of its site has been

amply met.

B. SINCE THE SDGP WAS NOT REVISED BY JANUARY 1, 1985, USE OF THE SDGP DESIGNATION TO DETERMINE PRIORITY IN AWARDING BUILDER'S REMEDIES AFTER JANUARY 1, 1985 WOULD BE DIRECTLY CONTRARY TO THE SUPREME COURT DETERMINATION THAT THE SDGP IS NO LONGER A "VIABLE REMEDIAL STANDARD".

The Supreme Court was aware that the data on which the SDGP was based was quite old and incomplete at the time of its decision, and declared that it was in need of revision by January 1, 1985:

> If the planning process does not remain a continuing one, the categories set forth in the SDGP might become unrealistic and certainly would lose a considerable degree of their legitimacy. It is one thing for a court to defer to the judgment of the planners, even where it disagrees; it is another to defer to a document that is clearly out of date where deferral might frustrate a constitutional obligation. In order for it to remain a viable remedial standard, we believe that the SDGP should be revised no later than January 1, 1985 (and, in the absence of proof of a more appropriate period, every three years thereafter). (emphasis added) Mount Laurel II at 242.

As Orgo Farms supra recognized, nothing in Mount Laurel II precludes a court from granting a builder's remedy in a limited growth area even prior to January 1, 1985. As this court recognized in Orgo Farms supra at 607, Mount Laurel II demonstrates in at least three distinct ways an intent not to make the SDGP a component of builder's relief. On the other hand, it is recognized that nothing in Mount

Laurel II explicitly precludes a court in decisions prior to January 1, 1985 from developer's giving lowest priority to developers remedies in limited growth areas. The answer is different, however, for remedial decisions after January 1, 1985. Sea Gull and Colts Neck ask this court to deny a builder's remedy to Orgo/Brunelli because it is in a limited growth area. The standard they proffer for deciding who gets a remedy is, pure and simple, status under the SDGP. Under the explicit language of Mount Laurel II, however, this remedial standard is no longer "viable" Mount Laurel II supra at 242 becasue the SDGP was not updated by January 1, 1985. Orgo/Brunelli does not understand how this court has the legal authority to determine a builder's remedy on the basis of a standard which the Supreme Court has stated is no longer a viable remedial standard.*

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* The Mount Laurel II decision allows a court for fair share purposes considerable discretion to modify growth areas in the SDGP for fair share purposes after January 1, 1985. The example which the court gives as a remedy, expanding the growth area, was directed to the one area in which the SDGP would unquestionably be used, determination of fair share. However, as Orgo Farms supra at 607 recognizes, the Mount Laurel II Court was silent about the use of the SDGP for purposes of builder's remedies and indeed in at least three distinct ways "expressed an intent not to make the SDGP a component of builder's relief." Assuming that the Supreme Court intended that the SDGP would not be a component for determining builder's remedies after Mount Laurel II there would be no reason for the Supreme Court to disucss a different rule after Janaury 1, 1985. Whatever the Supreme Court's intent for decisions prior to January 1, 1985, the conclusion is inescapable that the court did not consider SDGP to be a viable standard for determining builder's priorities after Janaury 1, 1985, in the absence of a revision of the plan.

C. THE GINMAN TESTIMONY FURNISHES AN ADDITIONAL BASIS WHY LOCATION IN THE LIMITED GROWTH AREA AFTER JANUARY 1, 1985 SHOULD NOT BE A STANDARD FOR DENYING A BUILDER'S REMEDY.

At the time that the Supreme Court wrote the Mount Laurel II decision, it was under the impression that the Housing Allocation Report prepared under the direction of the same Director, Richard A. Ginman, that had prepared the SDGP, had allocated all of the state lower income housing need to the "growth areas" of the SDGP. This fact was reflected in footnote number 17 of the Mount Laurel II opinion as originally written. Subsequently, the Court issued a revised footnote 17 recognizing that the Housing Allocation Report treated limited growth areas the same as growth areas, deferring obligations only for municipalities categorized as agricultural and conservation. Footnote 17 states that the "policy of the SDGP" Mount Laurel II at 244 requires that limited growth areas be classified the same as conservation and agricultural areas.

At trial, Richard Ginman testified that the Supreme Court had misinterpreted the State Development Guide Plan and the Housing Allocation Report when it determined that according to the policy of the SDGP the limited growth area was not a suitable area for the inclusion of lower income

housing. According to Ginman, the SDGP recognized that growth will continue in limited growth areas, and the worst possible purpose to which the SDGP could be put is to perpetuate exclusionary zoning policies in the low density suburbs of New Jersey, allowing for gradual growth in the limited growth areas for everyone except lower income households.* The Supreme Court, when it wrote the Mount Laurel II opinion, misunderstood this point. It attributed a "no growth" strategy to limited growth areas which was never intended, misinterpreting the policy of the SDGP.

This court need not address Ginman's testimony about the true intent of the SDGP since, in any event, the Supreme Court has declared that after January 1, 1985 it is no longer a "viable remedial standard". Nevertheless, if this court has any doubts about whether the limited growth designation of Orgo/Brunelli should affect its priority to a builder's remedy, Ginman's testimony should dispel them. There are now two crucial facts. First, according to Ginman, the agency which drafted the

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* Use of the SDGP was designed to encourage housing "infill" as a development policy. This policy would not be fulfilled in this case, since the "growth area" in Colts Neck Township is relatively remote and not serviced by utilities. The SDGP was not intended to be used to perpetuate suburban exclusionary housing patterns. Colts Neck Township has been rapidly "suburbanizing" for twenty-five years, utilizing thousands of acres for large lot residences.

SDGP, the Department of Community Affairs never intended to distinguish between growth area and limited growth area, never intended to penalize a developer because his site was in the limited growth area. Second, the Supreme Court never intended the limited growth designation to be a basis for penalizing a developer seeking a builder's remedy after January 1, 1985 because it is no longer a "viable remedial standard". In view of these two facts, it is inconceivable how Colts Neck and Sea Gull can argue that Orgo/Brunelli should be denied priority for a builder's remedy on the basis of its SDGP location.

III. EVEN IF THIS COURT HOLDS THAT IT WILL NOT ORDINARILY GRANT A BUILDER'S REMEDY IN LIMITED GROWTH AREAS, THERE ARE COMPELLING REASONS WHY ORGO/BRUNELLI SHOULD BE AWARDED A BUILDER'S REMEDY.

A. EQUITY DEMANDS THAT ORGO/BRUNELLI BE AWARDED A REMEDY IN THIS CASE.

Six years ago, Orgo/Brunelli requested Colts Neck Township to zone its property for lower income housing, citing the Department of Community Affairs Housing Allocation Report and Mount Laurel I. The Township was and is the most exclusionary in Monmouth County, permitting only single family homes of at least two thousand square feet of floor area on two acres of land. The Township had transformed several

square miles of farmland to this exclusive housing in the previous decade. Township officials vowed to resist this inclusionary zoning proposal at any cost, publicly labeling this and other Mount Laurel cases as "blockbusting lawsuits" in official Township newsletters. When Judge Merritt Lane, Jr. declared the Township's zoning to be contrary to its constitutional obligations, his judicial honesty and integrity were publicly questioned in the same "Township Committee Report" to the Township residents. The Appellate Division summarily upheld Judge Lane, and the Township government criticized those judges and the Mount Laurel doctrine. In the meantime, Orgo/Brunelli presented the case to the Board of Adjustment, in a case contested by the Planning Board and the Board of Education for sixty hours of adversarial proceedings. Orgo/Brunelli persevered through six years of intensive litigation against a well funded defense, and has prevailed on every issue except the final one to be decided - remedy.

Sea Gull, on the other hand, has no equitable claim. Sea Gull was a single family developer who obtained a two acre subdivision in Colts Neck Township shortly after Mount Laurel II. When Orgo/Brunelli pressed its claim, Sea Gull was advised by Township officials that its land could be rezoned to Mount Laurel uses to ward off the Brunelli claim

for a builder's remedy. Subsequently, the Township moved to bring Sea Gull into this case and later rezoned its land for Mount Laurel housing in an effort to defeat the Orgo/Brunelli claim. The equities demand a builder's remedy for Orgo/Brunelli, not Sea Gull.

To deny relief to Orgo/Brunelli would reward the Township's intransigence, recalcitrance and continuous litigation at all levels. It would punish good faith and perseverance.

B. TO PERMIT THE TOWNSHIP TO INVITE THE SEA GULL, LTD. PLAINTIFFS INTO THE LITIGATION, AND AS A RESULT TO DEFEAT THE RIGHT OF ORGO/BRUNELLI TO A BUILDER'S REMEDY, IS EQUIVALENT TO ENFORCING A "TIME OF DECISION RULE".

This Court decided that the "Time of Decision Rule" has no application in Mount Laurel proceedings. The rationale is that municipalities cannot by their own belated actions defeat the rights of the builders who have fulfilled the mandate of Mount Laurel II by pursuing the litigation in good faith for several years. The facts presented in this case on the issue of builder's remedy are virtually identical. Sea Gull, Ltd. had an existing single family large lot subdivision in Colts Neck Township at the time when the Township invited Sea Gull into the Orgo/Brunelli litigation and then rezoned its site for Mount Laurel housing. To decline to award a builder's remedy to

Orgo/Brunelli because of these subsequent events is directly contrary to the same principles that lead the Court to rule that the "Time of Decision Rule" had no application in these proceedings, and is directly contrary to the Supreme Court's directive that a "better site" cannot defeat the right to a builder's remedy in a successful and suitable plaintiff.

C. THE AUTHORS AND ADMINISTRATORS OF THE SDGP, THE DEPARTMENT OF COMMUNITY AFFAIRS, FOUND THAT THIS SPECIFIC PROPOSAL WAS IN CONFORMANCE WITH THE SDGP.

This case is unique in many respects, not the least of which is that before the Mount Laurel II decision, this applicant submitted his plans to the DCA for a determination as to whether or not the plan was inconsistent with the goals of the SDGP. DCA found no inconsistency. It would be quite inappropriate at this point, after the DCA Division of Planning has been disbanded by the Executive, for this Court to find that this determination was not correct. The Court should defer to the interpretation of the agency which was created to draft, prepare and administer the SDGP. In short, even if this Court should hold as a general rule that plaintiffs located in a limited growth area have the lowest priority for a developer's remedy, D.C.A.'s conclusion about Orgo Farms should exempt it from this general rule.

D. SUMMARY.

In summary, when this Court recognizes that the January 1, 1985 deadline for updating the State Development Guide Plan has not been met and that the SDGP is no longer a "viable remedial standard", when it reviews its 1983 decision in Orgo Farms, when it considers DCA's position that Orgo/Brunelli's application is consistent with the Guide Plan, when it considers the equities in this case and the history of litigation since 1978, the only possible conclusion is that Orgo Farms should be entitled to a builder's remedy despite its location on the SDGP map in a limited growth area.

IV. SEA GULL IS NOT ENTITLED TO A BUILDER'S REMEDY BECAUSE IT HAS NOT SUCCEEDED IN MOUNT LAUREL LITIGATION.

Mount Laurel II establishes a three-prong test that a plaintiff must satisfy to become entitled to a builder's remedy: the plaintiff must succeed in litigation; must propose a substantial amount of lower income housing; and his development must not be clearly contrary to sound land use planning. Mount Laurel II supra at 279-80. It is Orgo Farm's contention that Sea Gull is ineligible for a builder's remedy because it has not prevailed in litigation.

To evaluate Orgo Farm's argument, a review of this Court's recent decision in Allan-Deane Corporation v. Township of Bedminster (May 1, 1985) is helpful. There the

Court rejected the claim of Leonard Dobbs that he was entitlted to a developer's remedy. The Court there noted that a plaintiff who has not succeeded in litigation, by demonstrating the invalidity of the township ordinance, cannot satisfy the first prong and therefore is not entitled to a builder's remedy. Bedminster Id. at 41. In Bedminster, the Court rejected Dobbs' claim to a builder's remedy because Bedminster was brought to court and had its ordinance declared invalid long before Dobbs arrived on the scene. Id. Accordingly, the Court concluded that Dobbs did not bring about the process leading to ordinance compliance--a pre-requisite to a builder's remedy.

It is important to note that Orgo Farms brought Colts Neck to court in 1978 almost six years before Sea Gull brought its Mount Laurel complaint. Judge Lane invalidated Colts Neck's 1978 zoning ordinance in July 1979 almost five years before Sea Gull's complaint was filed. While Plaintiffs acknowledge that the Supreme Court remanded the matter to this Court for reconsideration in light of Mount Laurel II, Colts Neck chose upon remand not to attack the core finding of Judge Lane in the first Orgo Farms case that the two acre zoning throughout Colts Neck contained in the 1978 zoning ordinance did not provide opportunity for a single unit of lower income housing. This Court gave Colts Neck full opportunity to defend its 1978 ordinance, specifically asking the municipality on August 2, 1984 to notify it if it sought to defend its ordinance. The Township chose not to submit any evidence that its 1978 ordinance

provided a realistic opportunity for low and moderate income housing but rather chose to enact at the last minute a zoning amendment. The Township's failure to defend its 1978 ordinance was, in essence, a concession that Judge Lane's decision was correct, that Judge Lane had properly invalidated the 1978 ordinance on the basis of Orgo/Brunelli's proofs. Accordingly, the deficiency in the Colt's Neck Ordinance was effectively established before Sea Gull came on the scene. The fact that Sea Gull filed suit five years after Orgo/Brunelli prevailed before Judge Lane should not be sufficient to qualify Sea Gull as a prevailing plaintiff entitled to a builder's remedy.

CONCLUSION

Wherefore plaintiffs Orgo/Brunelli respectfully sumbit that they are entitled to the grant of a developer's remedy to build the specific project proposed and presented to the Court.

David J. Frizell